STATE OF MICHIGAN

COURT OF APPEALS

KEVIN KEASEY,

Plaintiff-Appellant,

v

ROBERT F. MIRQUE, JR., ROBERT F. MIRQUE, JR., PLC, a/k/a KLUCZYNSKI, GIRTZ & VOGELZANG, and GILBERT A. GIRTZ, PC,

Defendants-Appellees.

UNPUBLISHED
September 14, 2006

No. 269933
Kent Circuit Court
LC No. 05-007077-NM

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of defendants' motion for summary disposition. We affirm.

This case arose out of plaintiff's dissatisfaction with defendant Robert F. Mirque's legal representation in an underlying suit against plaintiff's former employer, Federal Express. In the original action, plaintiff alleged that Federal Express terminated his employment on the basis of a "no-fault" attendance system that improperly took into account absences that were protected under the Family Medical Leave Act, 29 USC 2601, *et seq*. On plaintiff's behalf, Mirque originally asserted that Federal Express should have counted Keasey's absences as days worked, but later added that Federal Express should not have counted the weekends in plaintiff's leave time when it calculated his overall attendance percentage. The federal district court that heard the original action rejected Mirque's initial argument as contrary to the law, and rejected the additional argument for plaintiff's failure to plead it. Therefore, the federal district court granted Federal Express's motion for summary judgment. After a disagreement over whether their contract for legal representation covered appeals, Mirque filed an appeal on plaintiff's behalf, but it was also rejected as tardy.

Plaintiff argues that the trial court erred by granting summary disposition to defendant, because if Mirque had timely brought the argument regarding Federal Express's improper inclusion of weekends in its calculation, he would have won the underlying suit. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). To succeed on his present claim, plaintiff must establish that, absent Mirque's negligent representation, he would have prevailed in his FMLA suit. *Colbert v Conybeare Law Office*, 239 Mich App 608, 619-620; 609 NW2d 208 (2000).

Plaintiff's FMLA claim depended on his ability to demonstrate that Federal Express improperly considered his FMLA leave when it decided to terminate him. 29 CFR 825.220(c).

On August 6, 2001, plaintiff told Federal Express that he was going on FMLA leave. Seventy-nine calendar days later, on October 23, 2001, plaintiff came off FMLA leave. Although it is unclear from the record, the parties agree that plaintiff took a total of eighty-nine[1] FMLA days during the year spanning from March 8, 2001 to March 10, 2002. He missed six additional days without any excuse, notwithstanding warnings regarding two other occasions where his attendance slipped below 96.9 percent during a one-year period. The parties agree that Federal Express used 96.9 percent as the rate of unexcused absences that would result in sanction or discharge. To calculate its absence rate, Federal Express used the base number of 260 workdays a year. In plaintiff's case, Federal Express subtracted the 89 days of FMLA time from the 260 days and arrived at a new base of working days, 171. It then divided the new base by the number of days actually worked, 165, which resulted in an absence rate of 96.49 percent. It then informed plaintiff of his failure to remedy his past attendance problems and terminated him. Mirque took plaintiff's case to federal court, complaining that Federal Express should have counted the FMLA leave as attended days. In response to Federal Express's motion for summary disposition, Mirque also claimed that, of the eighty-nine FMLA days, weekends should not count because they were not part of the 260-day work year. The trial court noted the novel argument but found that it was not pleaded, so it dismissed the complaint. Mirque had not moved the federal court to amend the complaint, and he failed to execute a timely appeal.

Plaintiff argued below that Mirque should have pleaded and demonstrated that Federal Express improperly included the "non-work" weekends in its subtraction of eighty-nine days from the 260-day work year. However, with far more time to ponder the problem than Mirque had, plaintiff has failed to demonstrate how the number of "non-work" weekend days erroneously calculated by Federal Express could possibly have exceeded twenty-two days. Plaintiff has failed to demonstrate, through affidavit or otherwise, when exactly his FMLA leave of absence began or whether it was taken consecutively. As the trial court pointed out below, subtracting the twenty-two weekend days between August 6, 2001 and October 23, 2001, would still leave FMLA time of sixty-seven work days and an absence rate of 96.8911 percent. Because this falls below Federal Express's acceptable rate, plaintiff failed to demonstrate that his original suit would have succeeded even if Mirque's novel theory would have been accepted in the original suit.[2]

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[1] It is unclear whether the parties arrived at eighty-nine days through miscalculation of the calendar period or whether Federal Express had recorded more leave time. Neither party explains where the additional ten days fall, if they exist at all, and plaintiff never raised this as an instance of Mirque's malpractice. Because our resolution of this case does not depend on resolving this issue, we merely note the anomaly in the proceedings.

[2] This interpretation of the evidence gives plaintiff more than the benefit of the doubt regarding the inclusion of weekend days in Federal Express's calculation. Plaintiff originally deemed all eighty-nine days as workdays in his pleadings and has never demonstrated exactly when he took the eighty-nine FMLA leave days. Under the circumstances, the trial court was generous in its

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As it is, the federal district court applied *Sawyer v Ball Corp*, 1997 US Dist LEXIS 23614 (ED Va, 1997), aff'd 151 F3d 1030 (CA 4, 1998), and found absolutely nothing wrong with Federal Express's original decision to subtract all eighty-nine days from plaintiff's 260-day work year. It also specifically pointed out that unexcused absences are a legitimate, nondiscriminatory justification for terminating employees who have incidentally taken FMLA leave. Under the circumstances, plaintiff has failed to present any support for his argument that the federal appellate system would have taken a different approach to these issues.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

(…continued)

assumption that the FMLA leave time included twenty-two weekend or non-workdays.